DIVISION ONE
FILED: 04/28/2011
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOHN D. HAYDT, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, FIFTY NINE MINUTE SERVICE, INC., Respondent Employer, SPECIAL FUND/NO INSURANCE SECTION, Respondent Party in Interest.	)	1 CA-IC 10-0033 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, ARCAP)

Special Action—Industrial Commission

ICA CLAIM NO. 20082-030450

CARRIER CLAIM No. NONE

Administrative Law Judge J. Matthew Powell

AWARD AFFIRMED

John D. Haydt
In Propria Persona

Mesa

Andrew F. Wade, Chief Counsel, Phoenix
The Industrial Commission of Arizona
Attorneys for Respondent

The Industrial Commission of Arizona/Special Fund/ Phoenix
No Insurance Section
By Suzanne Scheiner Marwil
Attorney for Respondent Party in Interest

W I N T H R O P, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("the ICA") award and decision upon review finding that the claim filed by John D. Haydt ("Applicant") for workers' compensation to be noncompensable. On review, Applicant argues that the Administrative Law Judge ("the ALJ") abused his discretion, and further, that Arizona Revised Statutes ("A.R.S.") section 23-1081(B) (Supp. 2010) is unconstitutional. For the following reasons, we reject the constitutional challenge and affirm the ALJ's finding of noncompensability.

FACTS AND PROCEDURAL BACKGROUND

¶2 Applicant is an electrician by trade. On November 23, 2004, Applicant filed a claim with the ICA, alleging work-related injuries and seeking compensation from his former employer, Liberty Cooling and Heating. The ICA eventually dismissed Applicant's request for a hearing and found his remaining claims against Liberty Cooling and Heating to be noncompensable ("the *Liberty* proceedings"). On appeal, this court affirmed the ICA's decision. *See Haydt v. Liberty Cooling*

& Heating, 1 CA-IC 08-20026 (Ariz. App. Feb. 19, 2009) (mem. decision). We upheld the ALJ's findings that: the claim for the November 23, 2004 injury was properly dismissed as untimely; the claim for the July 19, 2005 injury was disposed of in a compromise and settlement agreement approved by the ICA; and most pertinent to the instant appeal, the claim for the September 6, 2005 "electric shock" injury was noncompensable ("the *Liberty* injuries"). Although Applicant complained of suffering from cognitive dysfunction as a result of these electric shocks, he continued to work as an electrician after the final adjudication in the *Liberty* proceedings.

¶3 Following his employment with Liberty Cooling and Heating, Applicant was employed by Fifty Nine Minute Service, Inc. ("Employer") for a total of two months in 2005. Thereafter, he worked as a self-employed electrician under the business name "Electric Man." On July 21, 2008, Applicant filed a "Workers' Report of Injury" stating that he had developed an occupational disease pursuant to A.R.S. § 23-901.01 (1995) as a result of "Multiple Electrocutions" suffered while working for Employer. Applicant complained that he still suffered from "many neurological problems – caused by multiple, severe electrocutions while working." The claim was sent to the Special Fund/No Insurance Section of the ICA when it was determined that Employer did not possess workers' compensation coverage.

¶4 Thereafter, the ICA conducted a hearing at which the same medical experts from the *Liberty* proceedings were called to testify. None of the experts had reexamined Applicant since he had sustained and litigated the *Liberty* injuries, and the entirety of their testimony was drawn from their prior examinations of Applicant. At the hearing, Applicant was able to recall only five specific instances of receiving a severe electric shock that he contended led to his disease; three of these instances had already been litigated in the *Liberty* proceedings and the other two, he conceded, occurred years before he had worked for Employer. To support his argument that he had received a severe and compensable shock while working for Employer, Applicant testified that he received as many as one severe shock per every year he worked as an electrician. Applicant believed he must have received a severe shock in the two months that he worked for Employer; however, he admitted that: (1) he had never told Employer about the shock when it occurred; (2) he didn't remember when, or even if, he had been shocked while working for Employer until several days before the hearing; (3) he may not have ever been shocked while working for Employer; (4) he may have subsequently received a severe shock since leaving Employer and operating his own electrician business; and (5) most of the evidence he relied on to prove his injuries was based on reports and testimony from the *Liberty*

proceedings. Following completion of the testimony, the parties were then allowed to file post-hearing memoranda.

¶5 In his subsequent decision finding that Applicant's claims were noncompensable, the ALJ made the following relevant findings: (1) that Applicant failed to prove that he was working for Employer when he was last exposed to the potential hazard of severe electric shock; (2) that the principle of *res judicata* precluded the ALJ from again considering the *Liberty* injuries and testimony relating to those injuries; and (3) that Applicant had failed to prove any causal connection between his purported neurological disorder and any injury suffered while working for Employer. Accordingly, the ALJ held that Applicant did not suffer a compensable injury or occupational disease while working for Employer. On review, the ALJ confirmed his findings and award.

¶6 Applicant submitted a timely request for appellate review.[1] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(B) (2003) and 23-951 (1995).

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[1] Applicant argues that the answering brief submitted on behalf of the Special Fund/No Insurance Section violates Arizona Rules of Appellate Procedure 14, contending that the respondent's submission on appeal is too long. We disagree. The brief itself is only seventeen pages long and counsel also executed a certificate of compliance in which they aver that the word count is 3,974 words. Pursuant to ARCAP 14, appendices containing supporting documents are not included in the page limit.

DISCUSSION

¶7 Applicant argues, essentially, that the ALJ abused his discretion in finding his claim noncompensable because the ALJ's findings - specifically findings five and six – were insufficient to support such determination. Further, Applicant argues that A.R.S. § 23-1081(B) is unconstitutional and that the application of the statute has caused harm to both him and other applicants for workers' compensation.

¶8 Our review in industrial cases is "limited to determining whether or not the commission acted without or in excess of its power and, if findings of fact were made, whether or not such findings of fact support the award." A.R.S. § 23-951(B). We review the facts "in a light most favorable to sustaining the Commission's award." *Anton v. Indus. Comm'n*, 141 Ariz. 566, 569, 688 P.2d 192, 195 (App. 1984). We do, however, review issues of law *de novo*. *See id.*

¶9 Applicant argues that finding five of the ALJ's award is not supported by the weight of the evidence and further, that the ALJ failed to take into account the evidence he presented at the hearings. *See, e.g., Douglas Auto & Equip. v. Indus. Comm'n of Ariz.*, 202 Ariz. 345, 347, ¶ 9, 45 P.3d 342, 344 (2002) (noting that "although [the ALJ's] findings need not be exhaustive, they cannot simply state conclusions. Judges must make factual findings that are sufficiently comprehensive and

explicit for a reviewing court to glean the basis for the judge's conclusions" (citation omitted)). In finding five, the ALJ determined that Applicant "failed to prove to a reasonable degree of medical or legal probability" that Applicant was working for Employer as required by A.R.S. § 23-901.01 when he was last exposed to the hazard of severe electric shock. To support his determination, the ALJ: (1) cited § 23-901.01; (2) noted that Applicant has worked as an electrician since leaving Employer and, thus, potentially has subjected himself to severe shock after his employment with Employer; and perhaps most compelling, (3) noted that Applicant himself conceded that he was not positive he ever received any electrical shock, let alone a severe shock, while working for Employer. The evidence Applicant presents on appeal is almost identical to that which he presented at the hearing and only serves to show that he had, in fact, worked briefly for Employer, that severe electric shocks may lead to the types of cognitive impairment from which he suffers, and that he may possibly have received a severe shock triggering injury while working for Employer. The ALJ, and not this court, is the trier of fact, and we presume that the ALJ considered all relevant evidence. *See Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975). In this case the ALJ's finding was sufficiently supported by the evidence presented at the hearing, and we have no reason to believe that the ALJ failed to

consider any evidence presented by Applicant. In that regard, we further note that the ALJ specifically referred to Applicant's own testimony in finding five.

¶10 Applicant also takes issue with finding six of the award, arguing that the doctrine of *res judicata* should not have been applied to discount the testimony of his two expert witnesses, Dr. Yeamans and Dr. Bruce. Applicant contends that *res judicata* does not apply here because the instant claim involves a different employer, an alleged different electric shock, and therefore, a different injury than that litigated in the *Liberty* proceedings. Applicant, however, fails to recognize the fact that his experts' testimony was limited to their examinations, diagnoses, and findings as related to the *Liberty* injuries. Further, and perhaps most importantly, these experts also testified that they were not aware of any new injury Applicant suffered while working for Employer. Because the *Liberty* injuries had already been litigated to a final resolution, and those injuries were found to be noncompensable, the validity of the experts' opinions regarding those very same injuries could not be relitigated or re-considered by the ALJ in the instant case. *See Brown v. Indus. Comm'n*, 199 Ariz. 521, 524, ¶¶ 11-12, 19 P.3d 1237, 1240 (App. 2001) (stating that "[i]ssue preclusion prevents a party from relitigating an issue" which has already been litigated to a final judgment.); *see also*

Brown v. Indus. Comm'n, 48 Ariz. 161, 166, 59 P.2d 323, 325 (1936) (reiterating the fact that once an award is made, the compensability of the petitioner and the petitioner's condition at the time of the award is settled for all subsequent cases via *res judicata*).

¶11 The noncompensability of the *Liberty* electrical injuries was litigated to finality in the *Liberty* proceedings. The ALJ allowed Applicant to present expert testimony on (1) whether there was an injury and when it occurred, and (2) the causal connection between such injury and his brief employment with Employer. Applicant presented only that expert testimony he utilized in the *Liberty* proceedings, and has not demonstrated on appeal why the doctrine on *res judicata* does not foreclose relitigating the cause or compensability of the electrical injures in that claim. Nothing in the record suggests that the ALJ failed to consider relevant evidence presented by Applicant relating to his employment with Employer and any injuries he may have suffered during such employment. Accordingly, we find no error in the ALJ's invocation of *res judicata* as it applied to the experts' testimony regarding the *Liberty* injuries.

¶12 More to the point, based upon this record, the ALJ could easily conclude that Applicant was not injured while working for Employer, and we will not substitute our view of the

evidence for that of the ALJ. *See Glodo v. Indus. Comm'n*, 191 Ariz. 259, 262, 955 P.2d 15, 18 (App. 1997).

¶13 Finally, Applicant argues for the first time that A.R.S. § 23-1081(B) is unconstitutional and has violated his constitutional rights to due process, equal protection and also violates the state constitution's workers' compensation and supremacy clauses. In relevant part, § 23-1081(B) states:

> The administrative fund shall be no less than self-supporting with respect to the expenses of the industrial commission and other expenditures from the administrative fund as provided under this chapter. Unless the special fund . . . is not on an actuarially sound basis . . . *any surplus or deficit in the revenue provided under § 23-961 above or below the expenses of the industrial commission . . . shall be included in the calculation of the rate to be fixed for the following year . . . If the special fund is not on an actuarially sound basis . . . the industrial commission shall determine if there is a surplus in the revenue provided under § 23-961 that is greater than the expenses of the industrial commission and other expenditures from the administrative fund* as provided under this chapter. On notice from the industrial commission to the state treasurer, the surplus shall be transferred to the special fund.

(Emphasis added). Applicant contends that this language effectively requires the ICA to create a surplus out of the special fund in order to avoid funding it through the ICA's administrative funds. This, Applicant argues, motivates employees of the ICA to engage in hostile behavior towards and

unfair denial of claimants seeking workers' compensation from the special fund.

¶14 There is no evidence that Applicant has been palpably and personally injured by this statute, and therefore, he lacks standing to contest its constitutionality. *See Bennett v. Napolitano*, 206 Ariz. 520, 524, ¶ 16, 81 P.3d 311, 315 (2003) (holding that judicial policy requires "persons seeking redress in the courts first to establish standing, especially in actions in which constitutional relief is sought against the government"); *see also McKinley v. Reilly*, 96 Ariz. 176, 183, 393 P.2d 268, 273 (1964) (observing that, generally, "only those who are injured by the unconstitutional provision of a statute may raise an objection as to its constitutionality"). Applicant has not provided any evidence that the funding mechanism set forth in § 23-1081(B) caused him any particular harm, let alone denied him of any of his constitutional rights. Applicant has not identified any instance where he was not afforded all of his constitutional protections throughout the instant proceedings, and in fact, our review of the record reveals that the ALJ took care to accommodate virtually all of Applicant's requests. Even assuming that A.R.S. § 23-1081(B) in the abstract could motivate the ICA to "engage in unfair claims processing practices, bad faith legal defenses and judicial failure to consider evidence," we cannot find that any such conduct occurred here, let alone

that Applicant was the victim of any such behavior. Accordingly, Applicant lacks standing to challenge the constitutionality of A.R.S. § 23-1081(B).[2]

CONCLUSION

¶15 For all of the foregoing reasons the award is affirmed.

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LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____
PHILIP HALL, Presiding Judge

_____
JON W. THOMPSON, Judge

[2] We further note that Applicant never raised this issue before the ALJ. Because of our resolution of the standing issue, we need not reach the respondents' argument that Applicant has waived this issue on appeal.